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State of California



Fair Political Practices Commission

P.O. BOX 807 • SACRAMENTO, 95804 • • • 1100 K STREET BUILDING, SACRAMENTO, 95814

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June 16, 1981

Honorable Henry J. Mello
California State Senate
State Capitol, Rm. 4081
Sacramento, CA 95814

A-81-06-030

Re: Your Request for Written Advice Concerning
Kevin La Graff

Dear Senator Mello:

Thank you for your recent letter requesting our advice as to whether there is a conflict between Mr. La Graff's employment as your aide and his possible service as a member of the Board of Directors of the California Coastal Rural Business Development Corporation (Cal Coastal). You state that:

"Cal Coastal is organized pursuant to the California Small Business Development Law. ...Cal Coastal anticipates funding from the State Office of Small Business Development (OSBD). I am presently supporting language in next year's budget which would allow funding for organizations such as Cal Coastal."

You further state that Mr. La Graff has been asked to serve as a director of Cal Coastal and desires to know if such service would create a conflict for him. You have forwarded to us a copy of Cal Coastal's Articles of Incorporation.

The Political Reform Act of 1974 (Government Code Sections 81000-91014^{1/}) provides that:

No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.

Section 87100.

^{1/} All statutory references made are to the Government Code unless otherwise noted.

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The Act defines financial interest in several ways, one of which is as follows:

An official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on:

* * *

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee or holds any position of management.

Section 87103.
(Emphasis added.)

The Act further defines the term "business entity" as follows:

"Business entity" means any organization or enterprise operated for a profit, including but not limited to a proprietorship, partnership, firm, business trust, joint venture, syndicate, corporation or association.

Section 82005.
(Emphasis added.)

You have stated that "Cal Coastal is organized pursuant to the California Small Business Development Law." That law may be found at Corporations Code, Sections 14002, et seq. Section 14010 of the Corporations Code provides certain definitions, among them:

(a) "Corporation" or "the corporation" means any nonprofit California small business development corporation created pursuant to the provisions of this part.

(Emphasis added.)

The Articles of Incorporation of Cal Coastal show that it fits this definition. Therefore, it is not a "business entity" within the meaning of the Act and, consequently, Mr. La Graff would have no financial interest in it, merely by acting as a director.

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Mr. La Graff might have a financial interest in Cal Coastal if he received "income" of more than \$250 in return for his service as a director. Cal Coastal would then be a "source of income" to Mr. La Graff as defined in Section 87103(c). However, "reimbursement for travel expenses and per diem received from a bona fide educational, academic or charitable organization" is not considered income. Section 82030(b)(2). Having reviewed the Articles of Incorporation it appears that Cal Coastal may qualify as such an entity. If it has obtained tax-exempt status from the IRS as a 501(c)(3) organization, and if Mr. La Graff receives only reimbursement or per diem from Cal Coastal, rather than a salary, payments to Mr. La Graff would not be considered "income."

If Mr. La Graff receives \$250 or more in "income"^{2/} from Cal Coastal, then he would have to disqualify himself from participating in any way in any decisions which you might make relative to the OSBD budget item. Our regulation, 2 Cal. Adm. Code Section 18700 discusses in detail what constitutes participation in a governmental decision.^{3/}

In addition to the Political Reform Act, there are other provisions of law, beyond our purview, which may relate to this question and we merely direct your attention to them. One is found at Corporations Code Section 14110. Another is the Attorney General's recent Opinion No. 81-125 (April 19, 1981).^{4/} You may wish to also seek advice from the Attorney General and/or Legislative Counsel in this matter.

In closing, so long as Cal Coastal is a nonprofit corporation and so long as Mr. La Graff does not receive \$250 "income" from Cal Coastal, then there is no conflict of interest under the Political Reform Act.

Sincerely,


Robert E. Leidigh
Counsel
Legal Division

REL:kp
Enclosure

^{2/} "Income" is defined by Government Code Section 82030(a).

^{3/} A copy of that regulation is enclosed for your review. See particularly subdivisions (c), (d), (e) and (f).

^{4/} Copy enclosed for your convenience.

PLEASE RESPOND TO:
STATE CAPITOL, ROOM 4081
SACRAMENTO, CA 95814
(916) 445-5843

DISTRICT ADDRESS
701 OCEAN STREET
SANTA CRUZ, CA 95060
(408) 425-0401

1200 AGUAJITO ROAD
MONTEREY, CA 93940
(408) 373-0773

725 PACIFIC STREET
SAN LUIS OBISPO, CA 93401
(805) 543-4400

240 CHURCH STREET
SALINAS, CA 93901
(408) 757-4169

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Senate
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California Legislature

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RURAL CAUCUS



HENRY J. MELLO
SEVENTEENTH SENATORIAL DISTRICT

71030

Senate Majority Whip

May 14, 1981

Ted Prim, Executive Director
F.P.P.C.
P. O. Box 807
Sacramento, CA 95804

Dear Mr. Prim:

A member of my staff, Kevin La Graff, has been asked to serve on the Board of Directors of the California Coastal Rural Business Development Corporation (Cal Coastal). Cal Coastal is organized pursuant to the California Small Business Development Law---articles of incorporation enclosed.

Cal Coastal anticipates funding from the State Office of Small Business Development (O.S.B.D.).

I am presently supporting language in next year's budget which would allow funding for organizations such as Cal Coastal.

I do not want Kevin to enter into a directorship which may conflict with his employment in my office. Would you please render an opinion as to whether his service on the Board of Directors of Cal Coastal would conflict with his duties on my staff?

Thank you for your assistance.

Sincerely,

A handwritten signature in cursive script that reads "Henry J. Mello".

HENRY J. MELLO
17th Senate District

HJM:klj

Final
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ARTICLES OF INCORPORATION

OF

CALIFORNIA COASTAL RURAL BUSINESS DEVELOPMENT CORPORATION

I

The name of this corporation is California Coastal Rural Small Business Development Corporation.

II

A. This corporation is a private non-profit corporation and is not organized for the private gain of any person. It is organized pursuant to the California Small Business Development Law.

B. The specific purpose for which the Corporation is formed is to promote the economic development of small farms and rural and agricultural related businesses by making available capital, loan guarantees, management assistance, and other resources, including loan services, personnel and business education to small business owners for the purpose of promoting the health, safety and social welfare of California citizens, eliminating unemployment of the economically disadvantaged and stimulating economic, development, employment, and minority group and disabled persons' entrepreneurship. It is also formed with the intent to develop a flexible system to mobilize and coordinate the resources available for, and coordinate with other, employment, business, and economic development efforts.

III

The economically disadvantaged areas to be served by the Corporation may extend throughout the state of California. The principal office shall be located in Monterey County, and will primarily serve the mid-coastal region of California, which encompasses Monterey County, San Luis Obispo, northern Santa Barbara County, Santa Cruz County, San Benito County, and southern Santa Clara County. Geographically, the mid-coastal region is on the eastern watershed of the Coast Range of mountains between the greater urban area of San Francisco Bay Area

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in the north and greater Los Angeles in the south. The rural character and unity of the temperate coastal region is defined by the similarity of crops grown, the absence of major cities, and the homogeneity of the population.

IV

The name and address in the state of California of this Corporation's initial agent for service of process is:

V

The names and addresses of persons who shall act in the capacity of director until the selection of their successions, which shall constitute the number of directors of the Corporation until changed by admendment to the article of incorporation.

VI

A. This Corporation is organized and operated exclusively for charitable purposes within the meaning of Section 501 (C) (3) of the Internal Revenue Code.

B. Notwithstanding any other provision of these articles, the Corporation shall not carry on any other activities not permitted to be carried on by a corporation exempt from federal income tax under Section 501 (C) (3) of the Internal Revenue Code.

C. No substantial part of the activities of this Corporation shall consist of carrying on propaganda, or otherwise attempting to influence legislation, and the Corporation shall not participate or intervene in any political campaign (including the publishing or distribution of statements) on behalf of any candidate for public office.

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VII

The property of this Corporation is irrevocably dedicated to charitable purposes and no part of the net income or assets of this Corporation shall ever inure to the benefit of any director, officer or member thereof or to the benefit of any private person. Upon the dissolution or winding up of the Corporation, its assets remaining after payment, or provision for payment, of all debts and liabilities of this Corporation shall be distributed to a non-profit fund, foundation or corporation which is organized and operated exclusively for charitable purposes and which has established its tax exempt status under section 501 (C) (3) of the Internal Revenue Code.

Dated: _____

I hereby declare that we are the persons who executed the foregoing articles of incorporation, which execution is our act and need.

Dated: _____

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

GEORGE DEUKMEJIAN
Attorney General

OPINION	:	
of	:	
GEORGE DEUKMEJIAN	:	NO. 81-125
Attorney General	:	
	:	APRIL 9, 1981
CLAYTON P. ROCHE	:	
Deputy Attorney General	:	

THE HONORABLE DENNIS A. BARLOW, COUNTY COUNSEL,
YUBA COUNTY has requested an opinion on the following question:

May the same individual serve simultaneously as a member of the Yuba County Planning Commission and as a director of the Linda County Water District?

CONCLUSION

The same individual may not simultaneously hold the offices of county planning commissioner and county water district director.

ANALYSIS

The same person is presently an appointed member of the Yuba County Planning Commission and an elected director of the Linda County Water District organized under Water Code section 30000 et seq. Each of these political bodies functions in common territory. Therefore, decisions and actions by one could affect the other. The question presented is whether the same person may simultaneously occupy these positions.

There is no express constitutional or statutory provision which prohibits the simultaneous holding of these

two positions. Therefore, in order to answer the question presented, it is necessary to determine whether the common law doctrine of "incompatibility of office" is applicable. This doctrine encompasses the simultaneous holding of two public offices as opposed to employments. (58 Ops.Cal.Atty.Gen. 109 (1976).) There is no doubt that the position of a county planning commissioner is a public office. (See Government Code sections 1001 and 65150; 56 Ops.Cal.Atty.Gen. 488, 489 (1973) and 58 Ops.Cal.Atty.Gen. 323, 324 (1975).) Likewise the position of director of a county water district is an office. (32 Ops.Cal.Atty.Gen. 250, 252 (1958).)

The incompatibility doctrine has been stated by our Supreme Court, as follows:

"Two offices are said to be incompatible when the holder cannot in every instance discharge the duties of each. Incompatibility arises, therefore, from the nature of the duties of the offices, when there is an inconsistency in the functions of the two, where the functions of the two are inherently inconsistent or repugnant, as where antagonism would result in the attempt by one person to discharge the duties of both offices, or where the nature and duties of the two offices are such as to render it improper from considerations of public policy for one person to retain both. . . ." People ex rel. Chapman v. Rapsey, 16 Cal.2d 636, 641-642 (1940). (Emphasis added).

As stated in 17 Ops.Cal.Atty.Gen 129, 130 (1951), "[t]he public is entitled to have the full undivided services of each public officer." (Emphasis added; see also 21 Ops.Cal.Atty.Gen. 94, 97 (1953).) When these services in the form of duties clash, divided loyalty is the result.

The policy as stated in Chapman comprehends prospective as well as present clashes of loyalty. In the past this office had found incompatibility to exist with respect to potential conflicts of duty. (See 63 Ops.Cal.Atty.Gen. 623 (1980) and opinions cited therein.) "[O]nly one significant clash of duties and loyalties is required to make . . . offices incompatible. . . ." (37 Ops.Atty.Gen. 21, 22 (1961).) "The existence of devices to avoid . . . [conflicts] neither changes the nature of the potential conflict nor provides assurance that they would be employed. . . ." (38 Ops.Cal.Atty.Gen. 121, 125 (1961).) Once incompatibility of office is found to exist, acceptance of the second office creates an automatic vacancy in the first. (40 Ops.Cal.Atty.Gen. 238 (1962), 41 Ops.Cal.Atty.Gen. 98 (1963).)

To determine whether there are any inherent inconsistencies or interweaving of responsibilities in the functions of each office, it is necessary to examine the duties of each position.

A county planning commission by statute may be or be a component of the county planning agency (Gov. Code. § 65100, subd. (a)). The county planning agency is responsible for the preparation of the county general plan, and may, or if directed by the Board of supervisors, shall prepare "specific plans", including detailed regulations, conditions, programs, and proposed legislation, for the implementation of the county general plan. (Gov. Code §§ 65300-65307; 65450-65453.)

"The general plan must include:

"
(d) A conservation element for the conservation, development, and utilization of natural resources including water and its hydraulic force, forests, soils, rivers and other waters, harbors, fisheries, wildlife, minerals, and other natural resources. That portion of the conservation element including waters shall be developed in coordination with any county-wide water agency and with all district and city agencies, which have developed, served, controlled or conserved water for any purpose for the county or city for which the plan is prepared. The conservation element may also cover:

- (1) The reclamation of land and waters.
- (2) Flood Control.
- (3) Prevention and control of the pollution of streams and other waters.
- (4) Regulation of the use of land in stream channels and other areas required for the accomplishment of the conservation plan.
- (5) Prevention, control, and correction of the erosion of soils, beaches and shores.
- (6) Protection of watersheds.
- (7) The location, quantity and quality of the rock, sand and gravel resources. . . ."
(Gov. Code § 65302; emphasis added.)

The powers and purposes of a county water district, which are exercised by the directors thereof (Wat. Code, § 30576), are enumerated under Water Code section 31020 et seq. The duties to be performed by the water district include the following:

- § 31021. "A district may store water for the benefit of the district, conserve water for future use, and appropriate, acquire, and conserve water and water rights for any useful purpose."
- § 31022. "A district may operate water rights, works, property, rights, and privileges useful or necessary to convey, supply, store, or make use of water for any purpose authorized by this division."
- § 31022.5 "The powers conferred by this part include power to generate and sell at wholesale hydroelectric power in connection with any water conservative project of the district."
- § 31033. "A district may drain and reclaim lands within the district either by surface or underground works or both; and may acquire, by appropriation or other lawful means, and divert, store, conserve, transport or dispose of water resulting from such operations; and may acquire, by appropriation or other lawful means, and divert, store, conserve, transport or dispose of flood and storm water within the district, and flood and storm water of streams or water-courses outside of the district which flow into the district, for any beneficial purpose or use."

It is evident that the duties of the planning commission and the duties of the water district directors, as expressed in these sections, when taken in the context of the Chapman rules, may come into conflict and result in clashes of loyalty. The same conclusion was reached by us in a similar situation where we concluded that a county planning commissioner could not also hold the office of director of a California Water District organized pursuant to Water Code, section 34000 et. seq. (58 Ops.Cal.Atty.Gen.323, supra. See also, e.g., 63 Ops.Cal.Atty.Gen. 607 (1980), county planning commissioner and city councilman; 56 Ops.Cal.Atty.Gen. 488, supra, county planning commissioner and school district trustee; Attorney General's Unpub. Op. I.L. 74-223, city planning commissioner and state highway commissioner - all determined to be incompatible.) As stated in the just cited unpublished opinion of this office: "What is best for the state in highway location may differ significantly as to what . . . is best for the . . . city itself." (Id., at p. 6.) Likewise, what is best for the county in its planning activities may differ significantly from what is best for the county water district

and the exercise of its independent powers. (Cf., 37 Ops.Cal. Atty.Gen. 21, 22-23, city councilman and county water district director.)

Accordingly, for the foregoing reasons, we conclude that the same individual may not simultaneously hold the office of county planning commissioner and member of the board of directors of the Linda County Water District.

* * *